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NO._____

In The
Supreme Court Of The United States

OCTOBER TERM, 1982

KARL FLEISCHMANN, TRUSTEE
Appellant

v.

WETHERSFIELD PLANNING AND ZONING COMMISSION ET AL
Appellees

ON APPEAL FROM THE SUPREME COURT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Is due process denied to a party to a zoning hearing who requests that he be notified in writing as to the outcome, if:

(a) a notice published three days after the decision fails to give him actual notice; and
(b) a notice in writing is mailed to him twenty-one days after the decision, and he appeals nine days from then; and
(c) his appeal to the state courts is dismissed because he did not file it within fifteen days from publication as specified by statute?

May the Connecticut state courts disregard the due process standard applicable to the facts here and established by this court in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950) and *Schroeder v. City of New York*, 371 U.S. 208 (1962) *inter alia*, by their decisions that fail to cite those cases, although the cases were cited to them?

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*The parties below were Karl Fleischmann Trustee, Appellant; Wethersfield Planning and Zoning Commission, and Jordan Lane Associates, Appellees.

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STATEMENT UNDER RULE 28.4(c)

This shall give notice to the Attorney General of the State of Connecticut pursuant to United States Supreme Court Rule 28.4(c) that 28 U.S.C. §2403(b) may be applicable to this appeal.

OPINIONS BELOW

The order of the Connecticut Supreme Court denying certification was issued without opinion and the order was not published.

The opinion of the Appellate Session of the Connecticut Superior Court was published in 38 Conn. Supp. 590, XLIV No. 37 Conn. Law J. 2A (Mar. 15, 1983).

GROUNDS OF JURISDICTION IN THIS COURT

This proceeding arises from an appeal to the state courts of a zoning decision by a town planning and zoning commission. The decree sought to be reviewed is an order of the Connecticut Supreme Court entered January 26, 1983 denying a petition for certification for review of a decision of the Appellate Session of the Connecticut Superior Court.

The notice of appeal to this Court was filed March 29, 1983 with the Clerk of the Connecticut Supreme Court, and with copy to the Clerk of the Appellate Session of the Superior Court, as it is the Court possessed of the record.

Jurisdiction is conferred on this Court by 28 U.S.C. §1257(2) since the Appellant explicitly challenged below the constitutionality of the application of §8-28 Conn. Gen. Stats. See Appendix at pg. 11A. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562n4 (1980) (Opinion of Burger, C.J.). Alternatively, the Court has certiorari jurisdiction under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The central question presented may be rephrased as being whether §8-28 Conn. Gen. Stats. as applied to the Appellant is in violation of the due process clause of the 14th Amendment to the United States Constitution.

U.S. Constitution, 14th Amendment, Due Process Clause

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

§8-28 Conn. Gen. Stats.

> Notice of all official actions or decisions, not limited to those relating to the approval or denial of subdivision plans, of a planning commission shall be published in a newspaper having a substantial circulation in the municipality within fifteen days after such action or decision. Except as provided in section 8-30, any person aggrieved by an official action or decision, including a decision to take no action, of a planning commission, or any person owning land which abuts or is within a radius of one hundred feet of any portion of the land involved in any decision of a planning commission, may appeal therefrom, within fifteen days from the date when notice of such action or decision was so published, to the superior court for the judicial district within which the municipality with such planning commission lies. . . .

STATEMENT OF THE CASE

On September 15, 1981, the Planning and Zoning Commission of the Town of Wethersfield, Connecticut (hereinafter referred to as TPZ) held a hearing on the application of Jordan Lane Associates seeking a change of zone for an undeveloped parcel of land from B Residence to Planned Development-Town House. The parcel contains about four and one-half acres and abuts property of Karl Fleischmann Trustee, a 163 unit garden-apartment complex. Mr. Fleischmann attended the hearing and spoke at length in opposition to the change of zone. While the matter was under consideration, Leonard K. Tundermann, the Town's Director of Community Development, who acts as agent for the TPZ, exchanged correspondence with Mr. Fleischmann on a matter, of no present importance, related to the proceedings. In that exchange of correspondence, Mr. Fleischmann specifically asked in a letter dated December 9, 1981 to be notified of the outcome of the TPZ's deliberations. There is no question that Mr. Fleischmann's letter was received and understood, as appears from Mr. Tundermann's ultimate response. See Appendix at p. 12A.

The TPZ acted on December 15, 1981 approving the change of zone and in accordance with statute, §8-28 Conn. Gen. Stats., published a notice of its decision in the New Britain Herald on December 18, 1981. Mr. Fleischmann is not a resident of either Wethersfield or New Britain, does not and did not read the New Britain Herald, and this notice did not come to his attention.

On January 5, 1982, the Director of Community Development wrote a letter to Mr. Fleischmann in which he advised that responding to the request of December 9, 1981, he was giving notice of the TPZ's December 15th action. A copy of that letter is included in the Appendix at p. 12A. Nine days later, on January 14, 1982, Mr. Fleischmann filed an appeal to the Hartford Superior Court. The TPZ moved to dismiss the appeal on the grounds that a 15-day statutory appeal period ran from the December 18, 1981 date of publication and that the period

ended on January 2, 1982. In response to this motion, Mr. Fleischmann argued among other things that "The Defendant Board's notice to Plaintiff violated procedural due process,"[1] thereby timely raising in the Court of first instance the question here pursued.

The Superior Court, Dupont, J., dismissed the appeal by an unpublished decision entered April 16, 1982. The decision did not address this constitutional claim. See Appendix at p. 6A.

Mr. Fleischmann then took an appeal to the Appellate Session of the Superior Court and on July 15, 1982 filed a brief asserting that the appeal raised but one issue:

> Is notice by publication of a municipal board's decision sufficient under the due process clauses of both the United States and Connecticut Constitutions as to a party to the proceedings who has requested that he be directly advised of the outcome.

That brief cited the following cases in support of the proposition that notice by publication is insufficient as to a party to legal proceedings whose address is known to the tribunal:

> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, (1950); *Walker v. City of Hutchinson*, 352 U.S. 112, (1956); *Schroeder v. City of New York*, 371 U.S. 208, (1962); *Robinson v. Hanrahan*, 409 U.S. 38 (1972); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1973); *Shaffer v. Heitner*, 433 U.S. 186, 206 (1976); *Curtis v. Redevelopment Authority, Etc.*, 482 Pa. 58, 393 A.2d 377, 380 (1978); *Lindsey v. Greene*, 649 F.2d

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[1] Plaintiff's Memorandum of Law in Opposition to Motion To Dismiss (February 22, 1982, p. 3).

425 (6th Cir. 1981); *Stratman v. Watt*, 656 F.2d 1321 (9th Cir. 1981).

In its reply brief, the TPZ sought to distinguish those cases. The Appellate Session affirmed the decision of the trial court by its opinion entered December 24, 1982. It cited none of the authority presented to it by Mr. Fleischmann.[2] See Appendix at p. 2A.

On January 5, 1983, Mr. Fleischmann filed a petition with the Connecticut Supreme Court seeking certification by it for review of the Appellate Session's decision. The petition for certification cited the same cases as had been urged before the Appellate Session and further relied upon the failure of the Appellate Session to deal in any fashion with these cases. A brief in opposition filed by the TPZ on January 13, 1983 again sought to distinguish the cases. The Connecticut Supreme Court entered an order denying certification on January 26, 1983, and in accord with its practice, issued no opinion.

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[2] The TPZ attempted below to distinguish *Mullane* and *Schroeder* as establishing requirements for pre-hearing notice, which the TPZ asserted, differ from the due process requirements for post-hearing notice. No authority was cited for the claimed distinction. Such a distinction is untenable in principle: if a person is entitled to notice by mail before the commencement of proceedings which *may affect* his property interests, it follows that he is entitled to at least the same notice of the conclusion of those proceedings when they *have already affected* those interests, and he can only preserve them by appeal.

Thus, presented with an unpersuasive attempt to counter *Mullane* and *Schroeder*, the Appellate Session chose to apply *force majeure* and simply ignored their existence.

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

Unless the Connecticut Supreme Court's order is reversed, Appellant will be deprived of his due process right to notice of proceedings which affect his property interests.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), this Court decided the question of the due process sufficiency of a New York statutory procedure permitting a trust company to pool its funds upon notice by publication to trust beneficiaries. The Court held that while such notice is constitutionally sufficient as to beneficiaries of unknown whereabouts, it is insufficient as to those whose addresses are known. In reaching this conclusion, the Court reasoned as follows:

> "Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." 339. U.S. at 318.

> "The statutory notice to known beneficiaries is inadequate not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However, it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. . . . We hold that the notice of judicial settlement of accounts required by [New York statute] is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights."
>
> 339 U.S. at 319-20.

These principles were again determinative in the case of *Walker v. City of Hutchinson*, 352 U.S. 112 (1956), where the question was whether a property owner had been adequately notified of a condemnation proceeding through publication. In holding the notice insufficient, the Court said:

> "Measured by the principles stated in the *Mullane* case, we think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In *Mullane*, we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value."
>
> 352 U.S. at 116.

Six years later, the Court reaffirmed these principles in *Schroeder v. City of New York*, 371 U.S. 208 (1962). This was a condemnation case with a procedural context very similar to that of the case at bar. Mrs. Schroeder's property had been condemned and notice had been given by publication and posting, neither of which reached her attention. Consequently, her appeal was late filed, and was dismissed below for that reason. The Court observed that her name was readily ascertainable from both land records and tax rolls and held that it was the obligation of the municipality to advise her by mail. The Court summarized the *Mullane* rule as follows:

> "The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question. 'Where the names and post-office addresses of these affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.' "
>
> 371 U.S. at 212-213.

The continuing vitality of this principle is demonstrated in its application by this Court in three more recent cases: *Robinson v. Hanrahan*, 409 U.S. 38 (1972); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1973); *Shaffer v. Heitner*, 433 U.S. 186, 206 (1976).

The case at bar involves facts requiring the application of *Mullane* principles even more compellingly than did the facts in the cases cited above in which those principles were developed:

(a) There was some room for the City of New York in the *Schroeder* case to object to the burden imposed upon it in having to consult land records and tax rolls to ascertain the names of persons entitled to notice by mail of condemnation proceedings. Even that assertion was rejected. In the case at bar, however, there had been an exchange of correspondence between Mr. Tundermann, who acts as agent for the TPZ, and Mr. Fleischmann. Mr. Fleischmann's name and address appearing on his letterhead were in the TPZ file. His letter had requested direct notice of the TPZ's decision. Indeed, written notice was ultimately given and one is left to wonder why Mr. Tundermann waited until January 5, 1982 to write a letter giving notice of a December 15, 1981 decision whose insertion in the New Britain Herald he was able to arrange as early as December 18, 1981. It is a reasonable inference

that a Director of Community Development deals on a daily basis with zoning appeals, is familiar with the statutory fifteen-day-from-publication appeal deadline and sought, by the delay beyond fifteen days in the giving of written notice, to preclude a timely appeal. But whether or not one chooses to make this inference, the conclusion is inescapable under *Mullane, Walker* and *Schroeder* that a party who provides his name and address to a municipal agency and specifically asks to be notified of its decision is entitled to await notice by mail and is not bound by publication in a newspaper which did not come to his attention.

(b) Undoubtedly, some of the trust beneficiaries in the *Mullane* case had very small account balances, and it does not appear that the *Schroeder* property was of any significant value. Appellant here, however, as the owner of a sizeable apartment complex incurs substantial exposure to financial loss as a result of the rezoning. His appeal to the Connecticut Superior Court alleged that both drainage problems and a decrease in value would accrue. There can be no question that these financial consequences constitute substantial property interests.

A fair and expeditious disposition of this appeal would be a summary reversal and remand to the Connecticut Supreme Court. Such a disposition would strike a balance among the burdens on this Court, the interest of the State of Connecticut in evaluating the constitutionality of application of its statute, and the interest of the Appellant in receiving due process.

The order from which this appeal is taken is the Order of the Connecticut Supreme Court issued without opinion and denying certification under Connecticut Supreme Court rules analagous to the certiorari rules of this Court. Connecticut Practice Book §3135 et seq. The petition for certification filed by Appellant with the Connecticut Supreme Court asserted in detail the same constitutional

claims as are made in the present jurisdictional statement, but nevertheless, it is entirely possible that under the pressure of its own concerns, the Court below missed the significance of these claims. Thus, the law of Connecticut now is as enunciated by the Appellate Session of the Connecticut Superior Court. Its opinion fails to cite the authority upon which Appellant has relied throughout. It may well be that this decision is itself a denial of due process enforcing a technical violation of time limits while ignoring supervening constitutional principles which render those time limits unconstitutional of application. *Gilbert v. Sowders,* 646 F.2d 1146 (6th Cir. 1981); *Williams v. Tooke,* 108 F.2d 758 (5th Cir. 1940). But whether or not the decision of the Appellate Session itself produces a separate constitutional deprivation, it is surely an incorrect statement of the law.

The first principle of law stated in the Appellate Session's opinion is that "there is no constitutional right to judicial review of the action of a planning or zoning agency. Such review exists only under statutory authority." Appendix at p. 3A. Although the opinion does not go on to discuss the implication of this initial statement of principle, it seems clear enough that the Appellate Session believed that it follows from the absence of a right to appeal that appellate procedure need not satisfy any particular standard of fairness. This is not the law.

It has long been held by this Court that although a state may have no obligation to create a right, once it has acted to create that right, its beneficiaries cannot be denied it absent a procedure which complies with due process standards. *Goss v. Lopez,* 419 U.S. 565, 572-573 (1975); *Leis v. Flynt,* 439 U.S. 438, 441 (1979) ("As this Court has observed on numerous occasions, the Constitution does not create property interests. Rather it extends various procedural safeguards to certain interests 'that stem from an independent source such as state law.' ") *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 11 (1978) (Holding

that a public utility must afford due process before terminating service, where state case law requiring "cause" before termination gave rise to a "legitimate claim of entitlement" thereby triggering the application of due process standards.)

In the case at bar, the Appellant begins with an undisputed property interest as owner of real estate abutting that which was rezoned. Even if it is true that §8-28 Conn. Gen. Stats. which authorizes an appeal to the courts is not in and of itself constitutionally compelled, nevertheless, by its enactment, the state extended the constitutionally protected interests of the Appellant to include access to the courts in order to appeal. The Constitution forbids the state to take away with one hand that which it gives with the other. Adequate notice as defined by the *Mullane* principles discussed above must apply to zoning appeals under *Goss.* A zoning appellant is surely entitled to at least as much procedural regularity as a student expelled from school, or a light company customer.

Beginning on the wrong foot as it does, the Appellate Session's opinion goes on to discuss a variety of decisions of the Connecticut Supreme Court which construe various statutory requirements of notice. But there is nothing in these cases which bears upon the central issue here presented. Certainly notice by publication is in some circumstances proper, as appears from *Shea v. State Employees' Retirement Commission,* 170 Conn. 610, 616, 368 A.2d 159 (1976) and *Jarvis Acres, Inc. v. Zoning Commission,* 163 Conn. 41, 47, 301 A.2d 244 (1972), but neither of those cases consider the contention made here that a party requesting that notice in writing be sent to him has an entitlement to that under *Mullane* and its progeny.

The Appellate Session is finally on erroneous grounds in supporting its conclusion with the observation that to hold that the appeal here was timely filed would permit long delays and presumably increase judicial caseloads. If

a personal notice is sent by a municipal agency simultaneously with its publication, then the time to file an appeal in court is the same both as to those for whom notice by publication is sufficient and those for whom personal notice is required. No increase in litigation is to be anticipated.

The foregoing account of the disposition of this case by the Connecticut Supreme Court and the Appellate Session of the Superior Court gives rise to the following conclusions:

(a) The law of the State of Connecticut as now standing is the opinion of the Appellate Session and that opinion ignores *Mullane* and *Schroeder* and the other controlling opinions of this Court.

(b) The Appellant's day in court to contest the TPZ decision has been denied him as a consequence of the unconstitutional application of the notice by publication provision of §8-28 Conn. Gen. Stats.

(c) The Connecticut Supreme Court has never considered the merits of the claim which Appellant makes; although Appellant urged the Connecticut Supreme Court to do so in his petition for certification, that Court declined without opinion.

(d) This Court can rectify the situation without increasing its own crowded docket by taking jurisdiction, summarily reversing the Connecticut Supreme Court's order denying certification, and remanding to the Connecticut Supreme Court with direction to certify the case for review and to consider it in light of the principles enunciated by *Mullane* and *Schroeder* and their progeny.

CONCLUSION

For the foregoing reasons, Petitioner requests that jurisdiction be taken and that the appeal be disposed of as above requested.

Respectfully Submitted,

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Hartford, Connecticut
April 8, 1983

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Jurisdictional Statement has this 8th day of April 1983 been served upon Sabatini and Budney, One Market Square, Newington, CT 06111 and Kotchen, Ripper and Goldstein, 2264 Silas Deane Highway, Rocky Hill, CT 06067 by U.S. Mail, First Class Postage Prepaid. Service by the same means on said date is also certified upon the Attorney General of the State of Connecticut, Honorable Joseph Lieberman, 30 Trinity Street, Hartford, CT 06115 since 28 U.S.C. §2403(b) may be applicable. The foregoing constitutes service upon all parties and persons required to be served under United States Supreme Court Rule 28.

/s/ Karl Fleischmann

Karl Fleischmann
Member of the Bar of the
United States Supreme Court

No. 268269

KARL FLEISCHMANN, T'EE. : SUPREME COURT

v. : STATE OF CONNECTICUT

WETHERSFIELD P&Z COMM., ET AL. : JANUARY 26, 1983

ORDER DENYING CERTIFICATION

The plaintiff having filed a petition for certification and the court having considered said petition finds that it should be denied.

Whereupon it is ordered that said petition be and it hereby is denied.

BY THE COURT

/s/ Donald H. Dowling
Donald H. Dowling
Chief Clerk

NOTICE TO:
FLEISCHMANN, SHERBACOW & McWEENY
SABATINI & BUDNEY
KOTCHEN, RIPPER & GOLDSTEIN
CLERK, SUPERIOR COURT, HARTFORD
JANUARY 28, 1983

KARL FLEISCHMANN, TRUSTEE *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF WETHERSFIELD

APPELLATE SESSION OF THE SUPERIOR COURT

FILE NO. 1345

Argued October 19—decided December 24, 1982

Appeal from the decision of the defendant planning and zoning commission, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford, where the court, *Dupont, J.*, granted the defendant's motion to dismiss from which the plaintiff has appealed. *No error.*

Karl Fleischmann, pro se, the appellant (plaintiff-trustee).

Vincent F. Sabatini and *Michael P. Carey,* for the appellee (defendant).

PER CURIAM. The plaintiff has appealed to this court from the dismissal by the superior court of his appeal from a decision of the Wethersfield planning and zoning commission.

The relevant facts are as follows: On September 18, 1981, the Wethersfield planning and zoning commission heard the application of Jordan Lane Associates for a zone change for certain of its property. The plaintiff, whose property abuts the land involved in the proposed zone change, testified at the hearing in opposition to the rezoning. On December 9, 1981, the plaintiff requested the director of community development for the town to notify him of the commission's decision when it was rendered.

The commission granted the application on December 15, 1981, and had notice of its decision published on December 18, 1981, in the New Britain Herald, a newspaper of substantial circulation in the town of Wethersfield. The director of community development advised the plaintiff of the commission's action on January 5, 1982. The plaintiff filed an appeal from the decision to the superior court on January 14, 1982, which the court dismissed for the reason that it was not timely filed.

In his appeal from the dismissal, the plaintiff argues that notice by publication of a zoning commission's decision is insufficient under the due process clauses of the constitutions of the United States and Connecticut when an aggrieved person has requested personal notice of the decision. "There is no constitutional right to judicial review of the action of a planning or zoning agency. Such review exists only under statutory authority." (Citations omitted.) *Schwartz* v. *Town Plan & Zoning Commission*, 168 Conn. 20, 24-25, 357 A.2d 495 (1975).

The plaintiff's right to appeal in the present case is authorized by General Statutes § 8-28.[1] The plaintiff does not claim that the statute, in authorizing notice by publication, is constitutionally defective on its face or that the choice of the New Britain Herald does not comply with the statutory requirement that the newspaper be one with a "substantial circulation in the municipality." Rather, the plaintiff contends that due process mandates personal notice in his case because of his specific request for notification.

The fundamental requirements of due process are an "effective opportunity to be heard and *proper notice thereof.*" (Emphasis added.) *Society for Savings* v. *Chestnut Estates, Inc.*, 176 Conn. 563, 572, 409 A.2d 1020 (1979). There is no hard and fast rule defining what constitutes proper notice; rather, "due process requires that the procedure involved must be ap-

propriate to the nature of the case." *Shea* v. *State Employees' Retirement Commission*, 170 Conn. 610, 616, 368 A.2d 159 (1976). In construing the notice provision of General Statutes § 8-3 which, like § 8-28, authorizes notice by publication in a newspaper having a substantial circulation in the municipality, our Supreme Court has stated that the " 'fundamental reason for the requirement of notice is to advise all affected parties of the opportunity to be heard . . . .' What is required is not actual notice, but, rather, constructive notice." *Jarvis Acres, Inc.* v. *Zoning Commission*, 163 Conn. 41, 47, 301 A.2d 244 (1972). The intent is to notify "as much of the populace as possible." Id. This analysis applies as well to the notice provision of § 8-28 since that section extends the right of appeal to a large class of people comprised of abutting landowners affected by a zoning commission's decision and any person aggrieved by a commission's official action or decision.[2] Given the need to alert a potentially large number of people whenever a zoning commission renders a decision, notice by publication complies with the constitutional requirement of due process under these circumstances.

An additional reason to uphold the applicability of the notice provision of § 8-28 to the present case lies in the public policy considerations reflected in the setting of a specific statutory appeal period. "[A] statute such as § 8-28 fixing a rather brief time within which an appeal may be taken to the courts is designed . . . to secure, in the public interest, a speedy determination of the issues involved. . . . It would therefore be unreasonable to give to § 8-28 a meaning which would open the appeal process to delays flowing from any of the many factors which would cause a notice, seasonably given, to be long delayed in reaching the prospective appellant." *Akin* v. *Norwalk*, 163 Conn. 68, 74, 301 A.2d 258 (1972), quoting *Hubbard* v. *Planning Commission*, 151 Conn. 269, 272, 196

A.2d 760 (1963). Allowing the commencing of the appeal period to hinge upon the date of the receipt of a requested personal notice creates the spectre of unreasonable delay which the statute is intended to avoid.

It is undisputed that the defendant complied with the notice requirement set forth in § 8-28. Publication of the commission's decision on December 18, 1981, initiated the fifteen day appeal period; the plaintiff failed to file his appeal within that time. Statutory provisions limiting the time within which to take an administrative appeal are mandatory and, if not complied with, render an appeal subject to dismissal. *Royce* v. *Freedom of Information Commission*, 177 Conn. 584, 587, 418 A.2d 939 (1979).

There is no error.

DALY, COVELLO and F. HENNESSY, Js., participated in this decision.

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[1]General Statutes §8-28 provides in relevant part: "Notice of all official actions or decisions . . . of a planning commission shall be published in a newspaper having a substantial circulation in the municipality within fifteen days after such action or decision. . . . [A]ny person aggrieved by an official action or decision . . . of a planning commission, or any person owning land which abuts . . . the land involved in any decision of a planning commission, may appeal therefrom, within fifteen days from the date when notice of such action or decision was so published. . . ."

[2]See footnote 1, supra.

NO. 268269

KARL FLEISCHMANN, TRUSTEE	:	SUPERIOR COURT
VS.	:	JUDICIAL DISTRICT OF HARTFORD/NEW BRITAIN
	:	AT HARTFORD
WETHERSFIELD PZC, ET AL	:	APRIL 16, 1982

MEMORANDUM OF DECISION RE: DEFENDANT'S MOTION TO DISMISS

Plaintiff seeks to appeal a decision of the defendant Wethersfield Planning and Zoning Commission, published in the New Britain *Herald* on December 18, 1981. Defendant has moved to dismiss the action on the grounds that the appeal, dated January 14, 1982, was not filed within the statutory period, fifteen days after publication. Plaintiff claims that as a non-resident of Wethersfield he did not receive notice by publication and, therefore, the limitation should run from his actual notification by letter on January 5, 1982.

It is settled Connecticut law that the right of appeal from actions of administrative agencies is purely statutory and requires strict compliance with statutory provisions. *Farricelli v. Personnel Appeal Board,* 186 Conn. 198, 201, A.2d (1982); *Norwich Land Co. v. Public Utilities Commission,* 170 Conn. 1, 6, 363 A.2d 1386 (1975). In this case, the right to appeal the commission's decision on a proposed zoning charge derives from Connecticut General Statutes §8-28, which reads in pertinent part as follows:

> Notice of all official actions or decisions, . . . of a planning commission shall be published in a newspaper having a substantial circulation in the municipality within fifteen days after such action or decision. . . . [A]ny person aggrieved by an official action . . . , may appeal therefrom, within fifteen days from the date when notice of such action or decision was so published. . . .

Plaintiff does not challenge the commission's selection of the New Britain *Herald* as an appropriately located newspaper of substantial circulation but, rather, alleges that, as a non-resident, he does not read that paper. Thus, against the plain language of the statute, plaintiff attempts to assert an equitable right to an extension of time.

Equitable relief, in effect circumventing appeal procedures, may be granted where fraud or connivance by authorities is shown. *Doverman v. Cel-Mor Investments*, 26 Conn. Supp. 334, 335, 223 A.2d 220 (1966), but there is no such allegation in this complaint.

Nor can plaintiff base an equitable estoppel claim on the allegation that the commission "agreed" to notify him personally of its decision. He has not met the requirements for estoppel since he has not shown that he both exercised due diligence to obtain knowledge and lacked any reasonably available means to acquire such knowledge. *Lebowitz v. McPike*, 157 Conn. 235, 243, 253 A.2d 1 (1968).

In fact, plaintiff may be said to have had constructive notice of the commission's decision on the principle that "full and adequate means of knowledge ordinarily are, in law, equivalent to knowledge." *Attardo v. Ambriscoe*, 147 Conn. 708, 711, 166 A.2d 458 (1960). The court has held that publication requirements are intended to provide constructive notice to affected persons and that only constructive, not actual, notice is required, at least as to zoning

hearings. *Jarvis Acres, Inc. v. Zoning Commission*, 163 Conn. 41, 47, 301 A.2d 244 (1972).

Finally, the court has provided a policy justification for requiring compliance with time limits:

> Legislative provisions . . . fixing a relatively short time for instituting a review of the decision of an administrative agency by the courts, are necessarily designed to secure, in the public interest, a speedy determination.

Masone v. Zoning Board, 148 Conn. 551, 555-556, 172 A.2d 891 (1961) (Citations omitted).

Motion to Dismiss granted.

/s/ Dupont,J.
Dupont

IN THE SUPREME COURT OF THE
STATE OF CONNECTICUT

KARL
FLEISCHMANN
TRUSTEE
Appellant,

V. No. 268269

WETHERSFIELD
PLANNING AND
ZONING COMMIS-
SION ET AL
Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Karl Fleischmann Trustee, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order denying certification for review of the decision of the Appellate Session, entered herein on January 26, 1983.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated at Hartford, CT this 29th day of March, 1983.

[TIME CLOCK STAMP]

DONALD H. DOWLING
CHIEF CLERK
SUPREME COURT
Mar 29 2:45 PM '83
DRAWER Z STATION A
HARTFORD, CT 06106

/s/ Karl Fleischmann

Karl Fleischmann, Attorney
for Appellant
Fleischmann, Sherbacow &
McWeeny
60 Washington Street
Hartford, CT 06106

Certificate of Service

I hereby certify that a copy of the foregoing notice of appeal has this day been served upon Sabatini and Budney, One Market Square, Newington, CT 06011 and Kotchen, Ripper and Goldstein, 2264 Silas Deane Highway, Rocky Hill, CT 06067 by U.S. Mail, First Class Postage Prepaid.

/s/ Karl Fleischmann

Karl Fleischmann

Excerpt from Opinion of Appellate Session Respecting this Court's 28 U.S.C. §1257 (2) Jurisdiction.

The following excerpt, 38 Conn. Sup. 590, 591, demonstrates that Appellant claimed in an explicit and timely fashion that application of a state statute was repugnant to the 14th Amendment, and was understood by the court below to so claim:

> The plaintiff's right to appeal in the present case is authorized by General Statutes §8-28. *The plaintiff does not claim that the statute, in authorizing notice by publication, is constitutionally defective on its face* or that the choice of the New Britain Herald does not comply with the statutory requirement that the newspaper be one with a "substantial circulation in the municipality." *Rather, the plaintiff contends that due process mandates personal notice in his case because of his specific request for notification.* (Emphasis supplied.)

[Seal]

Town of Wethersfield
505 Silas Deane Highway
Wethersfield, Connecticut 06109

January 5, 1982 Telephone (203) 529-8611

Karl Fleischmann, Esquire
60 Washington Street
Hartford, Connecticut 06106

Dear Mr. Fleischmann:

Re: Zoning Application No. 700-81-Z

As requested in your letter to me of December 9, 1981, I can advise you that the above-referenced application for a change of zone from B Residence to Planned Development-Town House on a parcel of 4.5 acres extending from 447 Jordan Lane southerly to the Wilbur Cross Highway was approved by the Wethersfield Planning and Zoning Commission on December 15, 1981 by a vote of eight in favor and one opposed. The zone change became effective January 1, 1982.

Sincerely,

/s/ Leonard K. Tundermann
Director of Community
Development

LKT:sp